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Supreme Court, U.S.
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CASE NO. 09-

IN THE

SUPREME COURT OF THE UNITED STATES

ISAAC PEDERNERA,

Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for a Writ of Certiorari

Francisco A. Rodriguez, Esq.*
Akerman Senterfitt
One S.E. Third Avenue
25th Floor
Miami, Fla. 33131
305-374-5600

Tania Galloni, Esq.
Florida Immigrant
Advocacy Center
3000 Biscayne Blvd.
Ste. 400
Miami, Fla. 33137
305-573-1106

* Counsel of Record

QUESTION PRESENTED

The Government did not notify Mr. Pedernera of the final order of removal rendered against him until 43 days after the order was signed. The question presented in this Petition is:

> Whether the Government must comply with its obligation to serve notice of the final order of removal before the 30-day period to seek review of that order begins to run under 8 U.S.C. § 1252(b)(1).

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Isaac Pedernera respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit dismissing his petition for review of the order of removal rendered against him.

OPINION BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-2a) is unpublished.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit dismissed Mr. Pedernera's petition for review of the order of removal on April 22, 2009. Mr. Pedernera filed an emergency motion for rehearing, which the Eleventh Circuit denied on April 24, 2009. *See* Pet. App. 8a.

This Court has jurisdiction to review the Eleventh Circuit's order of dismissal pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit had

jurisdiction, pursuant to 8 U.S.C. § 1252(a)(d), to review the final order of removal.

RELEVANT STATUTORY PROVISIONS

8 U.S.C. § 1252(b)(1) provides in relevant part:

> (1) Deadline
>
> The petition for review must be filed not later than 30 days after the date of the final order of removal.

8 C.F.R. § 103.5a(c) provides in relevant part:

> (1) Generally. In any proceeding which is initiated by the Service, with proposed adverse effect, service of the initiating notice and of notice of any decision by a Service officer shall be accomplished by personal service,

except as provided in section 239 of the Act.

(2) Persons confined, minors, and incompetents

(i) Persons confined. If a person is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings initiated against him, service shall be made both upon him and upon the person in charge of the institution or the hospital. If the confined person is not competent to understand, service shall be made only on the person in charge of the institution or hospital in which he is confined, such service being deemed service on the confined person.

STATEMENT OF THE CASE

Under 8 U.S.C. § 1252(b)(1), a petition for review of an order of removal must be filed "not later than 30 days after the date of the final order of removal." In this case, Mr. Pedernera filed his petition for review within 30 days of the date that the Department of Homeland Security ("DHS") notified him of the final order of removal rendered against him. At issue in this case is whether "the date" under § 1252(b)(1) is the date when the order of removal was rendered or the date when the Government complied with its obligation to notify Mr. Pedernera of the order of removal.

I. Background Facts

Isaac Pedernera, an Argentine national, was admitted to the United States on September 24, 2000 through the Miami International Airport. *See* Pet. App. 11a. (Mr. Pedernera's Jurisdictional Brief). Mr. Pedernera was 19 years old at the time. *See id.*

In 2001, Mr. Pedernera met Vera Paez, a U.S. citizen who would later become his wife. Mr. Pedernera and Ms. Paez began living together in 2002. The couple initially lived in Miami, but moved to Jacksonville last year to take care of Ms. Paez's mother, who is terminally ill. Mr. Pedernera and Ms. Paez married on September 20, 2008. Ms. Paez has filed a relative petition so that Mr. Pedernera can adjust his immigration status to that of a lawful permanent resident. *See id.* at 11a-12a.

Late on January 2, 2009, Mr. Pedernera had an argument with his sister and his sister's husband. He was arrested on January 3, 2009, charged with two counts of simple battery, and taken to the Duval County Jail. He had never been arrested before, and has no other criminal history. *See id.*

On January 7, 2009, Mr. Pedernera was taken to an office in the Duval County Jail where he was interviewed by a U.S. Immigration and Customs Enforcement ("ICE") officer. Mr. Pedernera told the officer that he was married to a U.S. citizen and that he had never been

arrested before. *See id.* He asked the officer what could be done about his case, but the officer said he could not tell him anything. *Id.*

On January 13, 2009, Mr. Pedernera was sentenced to ten days in Duval County jail (time served) and placed on 12 months probation on one charge of battery - the other charge was dropped. Mr. Pedernera, however, was not released. *See id.*

On January 17, 2009, ICE agents took Mr. Pedernera from the Duval County jail to the Krome Detention Center in Miami. At Krome, an ICE officer asked Mr. Pedernera whether he wanted to see an immigration judge, and Mr. Pedernera responded that he did want to see a judge. Mr. Pedernera was also asked to consent to the entry of a voluntary deportation order, but he declined, explaining to the ICE officer that he wanted to present his immigration case. *See id.* at 12a-13a. Mr. Pedernera was never told that a removal order had already been rendered by the DHS.

On January 24, 2009, ICE moved Mr. Pedernera to the Glades County Jail. On February 20, 2009, Mr. Pedernera was served with a document titled "warning for failure to depart," notifying Mr. Pedernera for the first time that a final order of removal had been rendered on January 8, 2009 (just one day after his arrest, and while he was detained by local law enforcement at the Duval County Jail). *See id.* at 13a.

On March 20, 2009, within 30 days of being notified of the final order of removal, *pro bono* counsel filed a petition for review of the order of removal in the Eleventh Circuit Court of Appeals.

II. Procedural Background

The order of removal against Mr. Pedernera was rendered on January 8, 2009. At the time, Mr. Pedernera was in the custody of the Government, and the Government was required to notify Mr. Pedernera of any adverse immigration decision. *See* 8 C.F.R. § 103.5a(c)(2)(i). But the Government did not

notify Mr. Pedernera about the order of removal until February 20, 2009, 43 days after the order was signed.

1. On March 20, 2009, Mr. Pedernera filed a petition for review with the Eleventh Circuit and requested an emergency stay of removal.

2. On April 1, 2009, the Eleventh Circuit asked the parties to file jurisdictional briefs on two issues:

> (1) Whether there is a final order of removal over which this Court [The Eleventh Circuit Court of Appeals] has jurisdiction. *See* 8 U.S.C. § 1252(a)(1), (b)(9) & (d).
>
> (2) If yes, is the Petition for Review filed by Petitioner on March 20, 2009, timely? *See* 8 U.S.C. § 1252(b)(1).

3. In his jurisdictional brief, Mr. Pedernera argued that the order of removal was

final and subject to review pursuant to § 1252(a)-(b), and that the time to file his petition for review of an order of removal under § 1252(b)(1) did not begin to run until the Government complied with its obligation to serve notice of the order of removal. *See* Pet. App. at 13a-17a.

4. The Government conceded that the order of removal against Mr. Pedernera was final. And the Government did not produce any evidence indicating that it had served the order of removal on Mr. Pedernera – or otherwise notified him of it – before February 20, 2009. Instead, the Government argued that under § 1252(b)(1) the time to file a petition for review began to run the day the order of removal was rendered and had, therefore, lapsed on February 9, 2009, regardless of when the Government served notice of the order. *See* Pet. App. 16a (Government's Jurisdictional Brief).

5. On April 22, 2009, the Eleventh Circuit dismissed, *sua sponte*, Mr. Pedernera's petition for review for lack of jurisdiction, stating that:

> Isaac Pedernera's March 20, 2009, petition for review is untimely to review the January 8, 2009, order of removal from the United States Department of Homeland Security. *See* 8 U.S.C. § 1252(b)(1).

See Pet. App. 1a.

6. Mr. Pedernera moved for emergency rehearing and for rehearing en banc. But the Eleventh Circuit panel construed the motion as a motion for reconsideration and denied his request on April 24, 2009 by a quorum. *See* Pet. App. at 8a.

7. Mr. Pedernera was deported to Argentina that night.

8. This Petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a circuit split that affects the lives of thousands of immigrants facing removal proceedings. The Government rendered the final order of removal against Mr. Pedernera on January 8, 2009, but did not notify him about the order until February 20, 2009. Mr. Pedernera filed his petition for review with the Eleventh Circuit within 30 days from this date. And here lies the circuit split at issue in this case.

Mr. Pedernera's petition would have been timely in the First, Second, Third, Fifth, Sixth and Ninth Circuits. In these circuits, the 30-day period to file a petition for review does not start to run until the Government complies with its obligation to notify the immigrant ordered removed about the order of removal. Mr. Pedernera's petition, however, was dismissed for lack of jurisdiction because the Eleventh Circuit is one of the few circuits where the time to seek review of an order of removal begins to run on the date the order is rendered, irrespective of

whether the Government ever serves or otherwise gives any notice of the order to the immigrant ordered removed.

This Court should grant certiorari to resolve this conflict and restore uniformity to the right to judicial review of removal orders. The present split is unfair and untenable. An order of removal can mean life or death to an immigrant, and can tear families apart. The statutory right to seek judicial review of an order with such potentially devastating consequences should not depend on the circuit where an immigrant resides or is held in custody but should be uniformly protected throughout the United States.

I. Six Circuits Have Held That The Time To Seek Review Of An Order Of Removal Begins To Run When The Government Serves Notice Of The Order.

The First, Second, Third, Fifth, Sixth, and Ninth Circuits have each held that the time to petition for review under § 1252(b)(1) begins to run on the date the Government complies with its obligation to notify the immigrant ordered removed that a final order has been rendered. *See Chen v. U.S. Att'y Gen.*, 502 F.3d 73, 75 (2d Cir. 2007) ("The thirty days for filing a petition for review of the removal order ... do not begin to run until the BIA has complied with its regulations requiring service of the BIA's decision on the petitioner.");[1] *Rivas De Williams*

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[1] Most petitions for review filed in the circuit courts seek review of orders of removal rendered final by the Board of Immigration Appeals following removal proceedings before an immigration judge. Mr. Pedernera's order of removal, however, was summarily rendered and deemed final by the DHS under the assumption that Mr. Pedernera was a visa waiver program entrant and that he had waived his right to contest his removal. *See* 8 C.F.R. § 217. In any event, the Government has an obligation to serve notice of any

v. Gonzales, 239 Fed.Appx. 46, 48 (5th Cir. 2007) (*citing Ouedraogo v. I.N.S.*, 864 F.2d 376, 378 (5th Cir. 1989) ("the limitations period for filing a [petition for review] 'begins to run when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's address of record.'"); *Sieprawski v. U.S. Att'y Gen.*, 218 Fed.Appx. 201, 204 (3d Cir. 2007) ("[W]e have in unpublished decisions approved the Ninth Circuit's analysis ... that the 30 days do not begin to run until the BIA has complied with its obligation to mail the order in compliance with applicable regulations .... Thus, [the] petition would be timely if [petitioner] could show the BIA failed to serve the May 2 order in accordance with the regulations."); *Singh v. I.N.S.*, 315 F.3d 1186, 1188 (9th Cir. 2003) (*citing Hernandez-Rivera v. I.N.S.*, 630 F.2d 1352, 1355 (9th Cir. 1980)) (the "[t]ime for filing a review petition begins to run when the BIA complies with the terms of federal

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adverse immigration decision it makes, irrespective of whether the order is rendered final by the BIA or, like in Mr. Pedernera's case, summarily rendered by the DHS. *See* 8 C.F.R. § 103.5a(c).

regulations by mailing its decision to the petitioner's ... address of record."); *Radkov v. I.N.S.*, 248 F.3d 1127 (1st Cir. 2000) (vacating removal order for determination of whether the order of removal was mailed to the immigrant ordered removed); *Bonca v. I.N.S.*, 1994 WL 28464, *1 (6th Cir. 1994) ("The administrative record demonstrates that the decision of the Board was mailed to petitioner at his address of record on April 20, 1993. Consequently, the ninety-day filing period began to run on that day.").[2]

These circuit courts have all rejected the Government's argument that § 1252(b)(1) should be construed in a vacuum. Instead, these courts view §1252(b)(1) as part of a statutory scheme that provides a right to seek judicial review, and as such requires and presupposes service on the immigrant ordered removed. The Government must comply with its obligation in the statutory

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[2] *Bonca* was decided under a previous version of § 1252(b)(1) which allowed a petition for review to be filed within 90 days.

scheme for the time to seek review to start running. Any other rule would penalize the immigrant ordered removed for the Government's failure to comply with its obligation. *See Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996) ("the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations.").[3]

II. In The Eleventh, The Seventh, And The Tenth Circuits, The Time To Seek Review Of An Order Of Removal Begins To Run When The Order Is Rendered, Irrespective Of Whether or When Notice Is Given.

Unlike the First, Second, Third, Fifth, Sixth, and Ninth Circuits, the Eleventh,

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[3] This construction of § 1252(b)(1) turns on the interpretation of when the statutory time to petition for review *begins*, not on whether the time to petition may be extended after it ends based on considerations such as equitable tolling. *Cf. Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2366-67 (2007) (Statutory periods to seek review are jurisdictional and cannot be equitably tolled).

Seventh, and Tenth Circuits construe § 1252(b)(1) in a vacuum. These three circuit courts have concluded that the date the Government renders the order of removal triggers the review period even where the Government fails to comply with its service obligations.

In at least two decisions, the Eleventh Circuit has calculated the time to petition for review from the date the subject order of removal was rendered and rejected arguments that the time to seek review does not begin to run until the Government serves the order of removal. In this case, for example, the undisputed declaration of Mr. Pedernera established that the Government did not notify him that an order of removal had been rendered against him until February 20, 2009, 43 days after it was signed. But the Eleventh Circuit still concluded that Mr. Pedernera's "March 20, 2009, petition for review is untimely to review the January 8, 2009, order of removal from the United States Department of Homeland Security." *See* Pet. App. 1a. The Eleventh Circuit only focused on the date the order was

rendered and disregarded Mr. Pedernera's arguments that the petition was timely because it was filed within 30 days of February 20, 2009 – the date the Government notified Mr. Pedernera that a final order of removal had been rendered against him.

The Eleventh Circuit took the same approach in *Wettergreen v. U.S. Attorney General*, Case No. 02-15272-G (Jan. 6, 2003).[4] Despite the petitioner's argument that she had not been served with the order of removal, the Eleventh Circuit dismissed the petition holding that "the petition should have been filed within 30 days of the Board of Immigration Appeal's May 17, 2002, final order of removal." *See* Pet. App. 24a.

The Seventh and Tenth Circuits are in agreement with the Eleventh Circuit's approach. In *Nowak v. I.N.S.*, 94 F.3d 390, 392 (7th Cir. 1996), for example, the Seventh Circuit

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[4] A copy of the order dismissing the petition for review in *Wettergreen* is included in the appendix to this Petition. *See* Pet. App. 25a.

concluded that "the time to file does *not* begin when the BIA complies with the terms of federal regulations by mailing its decision to petitioner's address of record. It begins when the Board issues its order." (emphasis and quotation marks in original) Similarly, in *Nahatchevska v. Ashcroft*, 317 F.3d 1226, 1227 (10th Cir. 2003), the Tenth Circuit stated that "Section 1252(b)(1) requires the filing of a petition for review within thirty days 'after the date of the final order of removal,' not thirty days after *service* of that order upon the parties." (emphasis in original).

The Eleventh Circuit's orders in this case and in *Wettergreen* demonstrate that the Eleventh Circuit – together with the Seventh and Tenth Circuits – has rejected the majority view that the time to seek review under § 1252(b)(1) does not begin to run until the Government complies with its notice obligations. This construction of § 1252(b)(1) resulted in the dismissal of Mr. Pedernera's meritorious petition for review of an order of removal that itself was

issued without any hearing or due process in the first instance.[5]

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[5] Mr. Pedernera was likely to prevail on the merits of his petition for review. Mr. Pedernera was not provided any process before his deportation. The DHS summarily rendered a final order of removal against Mr. Pedernera without showing any evidence that Mr. Pedernera had in fact waived his right to contest removal before an immigration judge. This was reversible error. In the absence of any evidence of waiver, Mr. Pedernera had the right to appear before an immigration judge and seek adjustment of his immigration status based on his marriage to a United States citizen. *See Mokarram v. U.S. Att'y Gen.*, 316 Fed.Appx. 949, 951-54 (11th Cir. March 2, 2009) (holding there is no presumption that visa waiver entrant waived his rights to contest deportation; waiver must be proven); *Nose v. U.S. Att'y Gen.*, 993 F.2d 75, 78-79 (5th Cir. 1993) (visa waiver entrant has due process right to a hearing before Immigration Judge before deportation, though right can be waived if done knowingly and voluntarily); *see also* 8 U.S.C. § 1229a(a)(3) (removal proceeding before immigration judge is the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.") The DHS could not assume that Mr. Pedernera had knowingly and voluntarily waived his right to contest his deportation. *See id.*

III. This Case Is Ideal To Resolve The Circuit Split Over § 1252(b)(1).

This case presents the ideal opportunity for the resolution of this circuit split. The Eleventh Circuit's construction of § 1252(b)(1) was the sole basis for the dismissal of Mr. Pedernera's petition for review. In this case, there is no dispute that the Government did not notify Mr. Pedernera that a final order of removal had been rendered until 43 days after the order of removal was signed. Mr. Pedernera's statement that he first heard about the order of removal on February 20, 2009 when he was served with a document titled "warning for failure to depart" is undisputed. Indeed, Mr. Pedernera's testimony is confirmed by the fact that while the warning for failure to depart has a certificate of service indicating service on Mr. Pedernera, the order of removal does not have any indication that it was ever served. *Compare* warning for failure to depart stating that it was "served by Pedro Diaz" (Pet. App. 7a) *with* order of removal (Pet. App. 3a-4a).

Unlike other cases where the court has to make a factual determination about whether service occurred, *see Jahjaga v. U.S. Att'y Gen.*, 512 F.3d 80, 85-86 (3d Cir. 2008) (remanding for determination of whether Government had actually served order of removal), no such determination is needed here. This case raises a pure legal issue of whether the time to seek review of an order of removal can begin to run, and indeed lapse, before the Government ever provides notice that an order has been rendered.

The Eleventh Circuit's brief decision did not acknowledge the circuit split. But the order of dismissal makes clear that in the Eleventh Circuit the time to seek review of an order of removal begins to run on the day the order is rendered, irrespective of whether or when the Government ever gives notice of the order. The earliest case reflecting the Eleventh Circuit's construction of § 1252(b)(1) that Mr. Pedernera has been able to find was *Wettergreen*, Case No. 02-15272-G, which was dismissed more than six years ago, on January 6, 2003. *See* Pet. App. 25a. But it is impossible to determine how many other petitions for review the Eleventh Circuit

has dismissed in conflict with the majority view of § 1252(b)(1) because these decisions are generally not reported or published.

The resolution of this conflict is long overdue. This Court should take this opportunity to restore uniformity in such an important area of the law and allow equal access to judicial review of removal orders irrespective of the circuit in which the immigrant ordered removed is held in custody or resides.

IV. The Eleventh Circuit's Order of Dismissal Violates Due Process.

Certiorari is also warranted because the decision below is irreconcilable with the constitutional guarantee of due process. Mr. Pedernera had a fundamental due process right to a removal hearing before he could be deported from the United States. As this Court has long recognized, once a non-citizen enters this country, he enjoys the right to due process. *See Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-

598 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Mr. Pedernera, however, was deported without any process. He did not receive a hearing before the order of removal against him was rendered. He was not given an opportunity to assert his right to a removal hearing before an immigration judge. And, he did not receive notice that an order of removal had been rendered until 43 days after the order was signed.

The lack of any due process before the DHS rendered the order of removal was exacerbated by the dismissal of Mr. Pedernera's petition for review of that order. Under the Eleventh Circuit's construction of § 1252(b)(1), the last day for Mr. Pedernera to file his petition for review would have been February 7, 2009. But Mr. Pedernera could not possibly have filed his petition by that date because the Government did not notify him that an order of removal had been rendered against him until February 20, 2009.

The Eleventh Circuit's dismissal of Mr. Pedernera's petition for review means in essence that the Government can strip an immigrant of his statutory right to petition for judicial review of a final order of removal simply by failing to serve the order. This is wrong. The far reaching and devastating consequences of such a rule on fundamental due process cannot be overstated. As the Third Circuit reasoned in *Jahjaga*, "a failure to properly serve an order of removal – so that it may be challenged – offends the principles of our justice system." 512 F.3d at 85-86.

Even if one were to assume that the Government would not intentionally fail to comply with its obligation to serve removal orders, mistakes certainly occur in the immigration system. To deprive a petitioner of any right to judicial review of a removal order solely because of the Government's error or misconduct is inconsistent with any notion of basic due process.

CONCLUSION

No one should be expected to seek review of an order that he does not know has been rendered. Six circuits recognize this principle and hold that the time to seek review of an order of removal does not begin to run until the Government complies with its obligation to notify the immigrant ordered removed.

The Eleventh Circuit – together with the Seventh and Tenth Circuits – has now been in conflict with the majority view for more than six years. It is time for this Court to restore uniformity to an immigrant's statutory right to seek judicial review of an order of removal. Accordingly, Mr. Pedernera's petition for a writ of certiorari should be granted.

Respectfully submitted,

Francisco A. Rodriguez, Esq.
Florida Bar No. 0653446
AKERMAN SENTERFITT
SunTrust International Center
One S.E. Third Avenue – 25th Floor
Miami, Florida 33131-1704
Telephone: (305) 374-5600
Facsimile: (305) 374-5095

and,

Tania Galloni, Esq.
Florida Bar No. 619221
Florida Immigrant Advocacy Center
3000 Biscayne Blvd., Ste. 400
Miami, Florida 33137

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11397-H

ISAAC PEDERNERA,

Petitioner-Appellant,

versus

U.S. ATTORNEY GENERAL,

Respondent-Appellee.

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On Petition for Review from a
Final Immigration Order

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(Filed Apr. 22, 2009)

BEFORE: TJOFLAT, DUBINA and BLACK, Circuit Judges.

BY THE COURT:

This petition for review is DISMISSED, *sua sponte*, for lack of jurisdiction. Isaac Pedernera's March 20, 2009, petition for review is untimely to review the January 8, 2009, order of removal from the United States Department of Homeland Security. *See* 8 U.S.C. § 1252(b)(1).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 27-2 and all other applicable rules.

Petitioner's motion to stay his removal is DENIED AS MOOT.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT

ORDER OF REMOVAL

Sections 217 and 237

To: Isaac Gabriel PEDERNERA

File No.: [Alien Number Omitted]

Having determined that:

1) You are neither a citizen nor a national of the United States, and;

2) You were admitted to the United States on *September 21, 2000* at Miami International Airport under Section 217 of the Immigration and Nationality Act, and authorized to remain until *December 21, 2000*, and;

3) You have violated the conditions of that admission in that *after admission as a nonimmigrant under Section 217 of said Act, you have remained in the United States longer than authorized [Section 237(a)(1)(B)]*;

4) You have waived your rights to contest any action for removal, except to apply for asylum, having been admitted under Section 217 of the Immigration and Nationality Act.

By virtue of the authority vested in the Attorney General of the United States or his or her designated successor, the Secretary of the Department of Homeland Security, and in me as his delegate, by the laws of the United States,

I HEREBY ORDER that you be removed from the United States of America.

Michael Rozos	January 8, 2009
(Signature)	(Date)
Michael D. Rozos, Field Office Director	Miami, Florida
(Name and Title)	(Place)

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT

U.S. Department of Justice
Immigration and Naturalization Service

Warning for Failure to Depart

NAME:	DISTRICT OFFICE:	File #:
PEDERNERA, , Isaac	MIA/KRO	[Alien Number Omitted]

Section 243(a) of the Immigration and Nationality Act provides, in part, that:

> Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 237(a) who –
>
> > (A) willfully falls or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,
> >
> > (B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to prevent himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, United States Code, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 237(a)) or both.

Nothing in this section shall make it a violation to take proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

Any action the Immigration and Naturalization Service may take to obtain a travel document for your departure or to remove you will *NOT* relieve you of the liability for compliance with the provisions of law referred to in the first paragraph above.

"Section 241(a)(1)(C) provides for the extension of the statutory removal period if the alien refuses, during the removal period, to make application in good faith, for a travel or other document necessary for the alien's removal or departure or conspires or acts to prevent the alien's removal subject to an order of removal.

Date Order Final:	Ordered Removed under Section:
1/8/2009	237(a)(1)(B) under section 217 of the INA

Served By: (Print Name and Title of Officer)	Date:
Pedro Diaz, [Illegible]	2/20/09
Officer's Signature:	Location of Service:
[Illegible]	KROME SPC, MIAMI FL
Served On: (Alien's Signature)	Date:
Refused to sign	2/20/09

	Fingerprint of Alien (Specify finger used)
Attach certified mail receipts here.	[Fingerprint Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11397-H

ISAAC PEDERNERA,

Petitioner-Appellant,

versus

U.S. ATTORNEY GENERAL,

Respondent-Appellee.

Petition for Review of a Decision of the
Board of Immigration Appeals

(Filed Apr. 24, 2009)

Before DUBINA, and BLACK, Circuit Judges.*

PER CURIAM:

Petitioner's April 23, 2009, titled "Petitioner's Emergency Motion for Rehearing and Rehearing En Banc and to Stay Deportation", construed as a motion for reconsideration of our April 22, 2009, order dismissing this petition for lack of jurisdiction, is DENIED.

---

* This order is entered by a quorum. *See* 28 U.S.C. § 46(d).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DETAINED

CASE NO. 09-11397-H

ISAAC PEDERNERA,

Petitioner,

vs.

ERIC H. HOLDER, JR.
UNITED STATES ATTORNEY GENERAL,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

Francisco A. Rodriguez, Esq.
AKERMAN SENTERFITT
One S.E. Third Avenue –
25th Floor
Miami, Florida 33131-1704
Telephone: (305) 374-5600
Facsimile: (305) 374-5095

and

Tania Galloni, Esq.
Florida Immigrant Advocacy
Center
3000 Biscayne Blvd., Ste. 400
Miami, Florida 33137
Tel: (305) 573-1106, ext. 1080
Fax: (305) 576-6273

Pro Bono Counsel for Petitioner

PEDERNERA v. HOLDER, JR.

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following persons may have an interest in the outcome of this case:

Akerman Senterfitt, Counsel for Petitioner

Florida Immigrant Advocacy Center, Counsel for Petitioner

Dana M. Camilleri, Counsel for Respondent

Tania Galloni, Counsel for Petitioner

Eric H. Holder, Jr., United States Attorney General

Michael F. Hertz, Acting Assistant Attorney General

Isaac G. Pedernera, Petitioner

Ernesto H. Molina, Counsel for Respondent

Francisco A. Rodriguez, Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

None of the parties currently have corporate affiliates that have issued shares to the public.

/s/ Francisco A. Rodriguez
Francisco A. Rodriguez

INTRODUCTION

The Court has asked (1) whether there is a final order of removal over which this Court has jurisdiction and (2) whether the Petition for Review filed by Mr. Pedernera on March 20, 2009 was timely filed.

The U.S. Department of Homeland Security summarily entered a final order of removal against Mr. Pedernera on January 8, 2009 without providing him any process. Mr. Pedernera was not notified that an order of removal had been entered against him until February 20, 2009. Mr. Pedernera filed his Petition for Review within 30 days of this date. As such, this Court has jurisdiction over Mr. Pedernera's Petition.

BACKGROUND

Isaac Pedernera was admitted to the United States on September 24, 2000 through the Miami International Airport. *See* Dec. of Isaac Pedernera attached as Exhibit "1" to Petitioner's Motion to Stay. Mr. Pedernera was 19 years old at the time, and came to the United States at the request of his father. *See id.* at ¶ 2. His father had asked Mr. Pedernera to look after his sister, who was already in this country, and bought Mr. Pedernera's airplane ticket. *See id.* at ¶ 19.

In 2001, Mr. Pedernera met Vera Paez, a U.S. citizen who would become his wife. Mr. Pedernera and Ms. Paez began living together in 2002. The couple initially lived in Miami, but moved to

Jacksonville last year to take care of Ms. Paez's mother, who is terminally ill. Mr. Pedernera and Ms. Paez married on September 20, 2008. Ms. Paez has filed a relative petition so that Mr. Pedernera can adjust his immigration status to that of a lawful permanent resident. *See id.* at ¶¶ 3-5.

Late on January 2, 2009, Mr. Pedernera had an argument with his sister and his sister's husband. He was arrested on January 3, 2009, charged with two counts of simple battery, and taken to the Duval County Jail. He had never been arrested before, and has no other criminal history. *See id.* at ¶¶ 6-7.

On January 7, 2009, Mr. Pedernera was taken to an office in the Duval County Jail where he was interviewed by a U.S. Immigration and Customs Enforcement ("ICE") officer. Mr. Pedernera told the officer that he was married to a U.S. citizen and that he had never been arrested before. *See id.* at ¶¶ 8-9. He asked the officer what could be done about his case, but the officer said he could not tell him anything. *Id.*

On January 13, 2009, Mr. Pedernera was sentenced to ten days in Duval County jail (time served) and placed on 12 months probation on one charge of battery – the other charge was dropped. Mr. Pedernera, however, was not released. *See id.* at ¶ 9.

On January 17, 2009, ICE agents took Mr. Pedernera from the Duval County jail to the Krome Detention Center in Miami. At Krome, an ICE officer asked him whether he wanted to see an immigration

judge, and. Mr. Pedernera responded that he did want to see a judge. Mr. Pedernera was also asked to sign a deportation order, but he declined, explaining to the ICE officer that he wanted to contest his deportation. *See id.* at ¶¶ 12-13.

On January 24, 2009, ICE moved Mr. Pedernera to Glades County Jail, where he is currently detained. On February 20, Mr. Pedernera was served some papers indicating that a final order of removal had been entered against him on January 8, 2009 (just days after his arrest, and while he was detained at the Duval County Jail). *See* Tab A to Mr. Pedernera's Dec. Mr. Pedernera was asked to sign those documents, but he declined because he could not read English well. *See* Mr. Pedernera's Dec. at ¶ 14. He asked the officer to send the papers to his immigration lawyer, but the officer refused. On March 20, 2009, *pro bono* counsel filed a petition for review in this Court on Mr. Pedernera's behalf.

ARGUMENT

I. A Final Order of Removal Has Been Entered Against Mr. Pedernera.

This Court has jurisdiction under 8 U.S.C. § 1252 to review the final order of removal entered against Mr. Pedernera.

The U.S. Department of Homeland Security summarily entered a final order of removal against

Mr. Pedernera on January 8, 2009.[1] This order was entered without affording Mr. Pedernera any hearing before an immigration judge, and therefore did not proceed through the ordinary administrative process which requires a hearing before an immigration judge and an administrative appeal to the Board of Immigration Appeals. The order was deemed "final" by DHS, which has provided no avenue for appeal. Mr. Pedernera therefore has no administrative remedies available to him. No other court has reviewed the validity of the deportation order entered against him. The removal order, therefore, is final and reviewable under 8 U.S.C. § 1252(a)(1), (b)(9) & (d).[2]

---

[1] The Petition did not attach the order of deportation because at the time, Mr. Pedernera had not been served with a copy of the deportation order. The Government has since filed a copy of the deportation order in this appeal. *See* Appellate Record at 1.

[2] In its memorandum in opposition to Mr. Pedernera's motion to stay, the Government suggests that Mr. Pedernera entered the country through the Visa Waiver Program. The Government, however, has produced no evidence to show that Mr. Pedernera ever waived his right to a removal hearing. Even if Mr. Pedernera were in fact a Visa Waiver Program entrant, this Court still would have jurisdiction to review the removal order issued against him to determine whether the Government has carried its burden to establish that Mr. Pedernera voluntarily and knowingly waived his fundamental due process right to a hearing. *See Mokarram v. United States Attorney General*, 2009 WL 511500, *2-4 (March 2, 2009); *see also Nose v. U.S. Att'y Gen.*, 993 F2d. 75, 78-79 (5th Cir. 1993).

II. Mr. Pedernera's Petition Was Timely Filed.

Mr. Pedernera's Petition for Review is timely, as it was filed within 30 days after DHS first provided Mr. Pedernera any notice that an order of removal had been entered against him.

A petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation. *See* 8 U.S.C. § 1252(b)(1). The time for filing, however, does not begin to run until the issuing agency "complies with the terms of federal regulations by mailing its decision to petitioner's [or his counsel's] address of record." *See Singh v. Immigration and Naturalization Serv.*, 315 F.3d 1186, 1188 (9th Cir. 2002); *see also Radkov v. I.N.S.*, 248 F.3d 1127, 1127 (1st Cir. 2000); *Gaur v. Ashcroft*, 65 Fed.Appx. 773, 774 (3d Cir. 2003); *Bonca v. I.N.S.*, 1994 WL 28464, * 1 (6th Cir. 1994); *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Younus v. I.N.S.*, 968 F.2d 22, 22 (10th Cir. 1992); *Quedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989). The reason for this rule is that an immigrant cannot be expected to appeal a removal order that he does not know has been entered. *See id.* Indeed, the right to appeal would be illusory if it could be defeated by the government's failure to notify an immigrant about the entry of a deportation order.

Here, Mr. Pedernera was not provided any process, much less notice of the order against him. The final order of removal was apparently entered against Mr. Pedernera while he was in state custody,

just one day after he was interviewed by immigration officers at the Duval County Jail. He was not given the opportunity to appear before an immigration judge, and was never provided a copy of the order entered against him. Mr. Pedernera was not notified that a removal order had been entered against him until February 20, 2009, when a deportation officer gave him other papers that happened to indicate that a final order of removal had been entered. Mr. Pedernera's attorneys were not even provided a copy of that order until the Government filed it in opposition to his motion for a stay of removal.

Mr. Pedernera's testimony is undisputed. In addition, the order of removal that the Government has produced before this Court does not have any certificate of service or any other indication that it was served on Mr. Pedernera or his attorney. The Government has not even averred that it served the order on him.

Even after that order was purportedly entered on January 8, 2009, immigration officers asked Mr. Pedernera whether he wanted to contest his deportation before an immigration judge. On January 17, 2009, immigration officers apparently asked Mr. Pedernera if he wanted to sign a stipulated order of removal, consenting to his removal. But he declined, saying that he wanted to contest his case. Mr. Pedernera would therefore have had no reason to believe a final order had been entered against him.

Mr. Pedernera filed his Petition within 30 days from the date when he first received notice that a removal order had been entered against him. As such, the Petition for Review was timely filed.

Respectfully submitted,

AKERMAN SENTERFITT
SunTrust International Center
One S.E. Third Avenue – 25th Floor
Miami, Florida 33131-1704
Telephone: (305) 374-5600
Facsimile: (305) 374-5095

By: /s/ Francisco A. Rodriguez
Francisco A. Rodriguez, Esq.
Florida Bar No. 0653446
francisco.rodriguez@
akerman.com

and,

Tania Galloni, Esq.
Florida Bar No. 619221
Florida Immigrant Advocacy Center
3000 Biscayne Blvd., Ste. 400
Miami, Fla. 33137
Tel: (305) 573-1106, ext. 1080
Fax: (305) 576-6273

Pro Bono Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ISAAC PEDERNERA **Petitioner,** **(DETAINED)** **v.** **ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,**[1] **Respondent.**	**No. 09-11397-H** **Agency No.** [Alien Number Omitted] **RESPONDENTS' RESPONSE TO JURISDICTIONAL QUESTIONS AND MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION**

Respondent respectfully hereby moves to dismiss this petition for review pursuant to Immigration and Nationality Act ("INA") § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2006), because this petition is untimely. Isaac Pedernera ("Petitioner") seeks review of a final order of removal issued by the Department of Homeland Security on January 8, 2009. *See* Petition for Review at Tab 1.

The petition for review was not filed until March 20, 2009, well beyond the thirty-day statutory deadline for seeking judicial review. Accordingly, the petition for review should be dismissed for lack of jurisdiction because it is untimely.

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[1] As Attorney General, Eric H. Holder, Jr. is substituted for the former Attorney General as the proper Respondent. *See* Fed. R. App. P. 43(b) and (c)(1).

BACKGROUND

Petitioner is a native and citizen of Argentina. Certified Administrative Record ("AR") 3-4, 6.[2] He entered the United States on September 24, 2000. *Id.* Petitioner met Vera Paez, his wife, in 2001. *See* Petitioner's Emergency Motion for Stay at 5. The couple married on September 20, 2008. *Id.* Allegedly, Petitioner's wife filed a petition for adjustment of status for Petitioner to become a lawful permanent resident at some point after they were married. *Id.*

The Petitioner was charged with two counts of simple battery on January 3, 2009, as a result of an argument between his sister and her husband. AR 7-8. On January 13, 2009, the Petitioner pled nolo contendere to one charge while the second charge was dropped. *Id.* at 5. The court sentenced Petitioner to ten days in Duval County Jail, credited time served, and placed him on twelve months probation. *Id.* The Petitioner was then transported from Duval County Jail to Krome Detention Center in Miami, Florida, on January 17, 2009. He is currently being held at Glades County Jail. *Id.* at 6.

---

[2] The Arrival-Departure Record, CBP Form I-94W (green form), must be completed by all non-immigrant visitors seeking entry to the United States under the Visa Waiver Program ("VWP"). Applicants using a Form I-94W are exempt from having a visa. After successful completion of processing the applicant, the CBP officer retains the arrival portion and returns the departure portion of the Form I-94W and passport to the applicant. *See* http://cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/cbp_i94w_form.xml.

While Petitioner's criminal proceedings were taking place on January 8, 2009, the Immigration and Customs Enforcement ("ICE") issued an order of removal against the Petitioner. AR 1. A Notice of Intent to Remove was also issued informing Petitioner that he had violated the terms of his admission under the VWP and, as a result, pursuant to INA § 217, 8 U.S.C. § 1187 (2006), would be removed from the United States. AR 2.

According to Petitioner, on February 20, 2009 ICE asked him to sign papers regarding a removal order that was previously entered against him. Petitioner's Emergency Motion at 6. The Petitioner refused to sign the papers. *Id.* On that same day, Petitioner was served a document, "Warning for Failure To Depart," stating that a final order of removal was issued against him on January 8, 2009, under Section 217 of the INA for the Visa Waiver Program. *Id.* The Petitioner further alleges that he has not seen an immigration judge or received a copy of any order of removal. *Id.* at 7.

On March 20, 2009, Petitioner filed the petition for review with this Court. On March 26, 2009, the Petitioner filed Petitioner's Emergency Motion for Stay of Removal.

ARGUMENT

I. Order Before The Court Is A Final Order Of Removal Under U.S.C. § 1252(a)(1), (b)(9) & (d).

A final order of removal consists of orders either in deportation or removal proceedings or entered in response to direct challenges to deportation orders. *Cheng Fan Kwok v. INS,* 392 U.S. 206, 215 (1968). Here, the Petitioner seeks review of an order issued by DHS to remove him to Argentina dated January 8, 2009. AR 1. This order constitutes a final order of removal because it is an order that authorizes DHS to effect the Petitioner's removal and it is an order issued during removal proceedings conducted pursuant to INA. Accordingly, since DHS issued a final order of removal within the meaning of INA § 242(a)(1), (b)(9) & (d); 8 U.S.C. § 1252(a)(1), (b)(9) & (d), this Court has jurisdiction to review the Petitioner's final order of removal to the extent that Petitioner meets the statutory timeliness requirements for a petition for review of that decision.

II. The Court Lacks Jurisdiction Over the Petitioner's Untimely Petition For Review.

Aliens, such as the Petitioner, may seek this Court's review of a final order of removal within thirty days of the issuance of that order. *See* 8 U.S.C. §§ 1252(b)(1). Here, the final order of removal was issued against Petitioner by DHS on January 8, 2009. *See* AR at 1. Thus, the Petitioner was required to file

a petition for review of that decision on or before February 9, 2009.[3] However, the petition for review was not filed until March 20, 2009. That being the case, the Court should dismiss the petition for review for lack of jurisdiction.

---

[3] Petitioner claims that his petition is timely as it was filed within thirty days "of his receiving notice that a final order was entered against him." Petitioner's Emergency Motion at 6. However, he also states that he was asked to sign the removal order at some time between January 17, 2009 and January 29, 2009. *Id.* Notwithstanding this discrepancy, the time limits for filing petitions for review of final orders of removal are mandatory and jurisdictional and the untimely nature of the instant petition for review statutorily bars this court from considering it. *See* 8 U.S.C. § 1252(b)(1); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272 n.3 (11th Cir. 2005), ("Since the statutory limit for filing a petition for review is an immigration proceeding is 'mandatory and jurisdictional,' it is not subject to equitable tolling.")

CONCLUSION

The petition for review should be dismissed because the appeal is untimely.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant
Attorney General

JAMIE M. DOWD
Senior Litigation Counsel

/s/ Dana Camilleri
DANA CAMILLERI
Trial Attorney
Office of Immigration
Litigation
Civil Division
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4899

Attorneys for Respondent

Date: April 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2009, two copies of the foregoing pleading was served upon Petitioner by placing it in the Department of Justice mail room for same-day mailing, using Federal Express to assure receipt within three days, addressed to:

Francisco A. Rodriguez, Esq.
& Michael Marsh
1 Southeast 3rd Avenue
25th Floor
Miami, Florida 33131-1704

Tania Galloni, Esq.
3000 Biscayne Boulevard
Suite 400
Miami, Florida 33137

/s/ Dana Camilleri
DANA CAMILLERI
Trial Attorney
Office of Immigration
Litigation
Civil Division
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4899

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15272-G

SHIREEN E. WEERGREEN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND
NATURALIZATION SERVICE,

Respondents.

On Petition for Review of a Final Order of the
Board of Immigration Appeals

(Filed Jan. 6, 2003)

Before: TJOFLAT, ANDERSON, and BLACK, Circuit Judges.

BY THE COURT:

This petition for review is DISMISSED for lack of jurisdiction. To be timely, the petition should have been filed within thirty (30) days of the Board of Immigration Appeals's May 17, 2002, final order of removal. See 8 U.S.C. § 1252(b)(1). The petition, filed on September 26, 2002, is untimely.

SUPREME COURT, U.S.
FILED
JUL 26

No. 09-106

In the Supreme Court of the United States

ISAAC PEDERNERA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JENNIFER P. LEVINGS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review filed by petitioner, a Visa Waiver Program alien, more than 30 days after the agency's removal order, where 8 U.S.C. 1252(b)(1) provides that such petitions "must be filed not later than 30 days after the date of the final order of removal."

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In the Supreme Court of the United States

No. 09-106

ISAAC PEDERNERA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2009. An Emergency Motion for Rehearing and Rehearing En Banc and to Stay Deportation, construed by the court of appeals as a motion for reconsideration, was denied on April 24, 2009 (Pet. App. 8a). The petition for a writ of certiorari was filed on July 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), a petition for review of an order of removal "must

be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The time limit for filing a petition for review in an immigration case is "mandatory and jurisdictional." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (citations omitted).

b. An alien who wishes to visit the United States temporarily for business or pleasure generally must obtain a non-immigrant visitor's visa (B-visa). See 8 U.S.C. 1101(a)(15)(B), 1201(a)(1)(B); 22 C.F.R. 41.12, 41.31. A non-immigrant alien is inadmissible if he does not possess "a valid nonimmigrant visa * * * at the time of application for admission." 8 U.S.C. 1182(a)(7)(B)(i)(II).

Aliens from designated countries, however, may seek admission to the United States for up to 90 days as visitors for business or pleasure through the Visa Waiver Program (VWP) without having to obtain a non-immigrant visitor's visa. See 8 U.S.C. 1187(a). To obtain admission under the VWP, the alien must waive certain rights, including any right (1) to administrative or judicial review of an immigration officer's determination as to admissibility, and (2) to contest removal after admission, except on the basis of an application for asylum. 8 U.S.C. 1187(b); see 8 C.F.R. 217.4; see also, *e.g.*, *Itaeva* v. *INS*, 314 F.3d 1238, 1239 (10th Cir. 2003). Applicants who do not execute a waiver of such rights "may not" be granted a visa waiver. 8 U.S.C. 1187(b); see 8 C.F.R. 217.2(b)(1) (requiring completion of Form I-94W).[1]

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[1] Form I-94W, the Arrival-Departure Record, must be completed by all non-immigrant visitors seeking entry to the United States under the VWP. That form contains a section indicating agreement to waive rights to a hearing to contest removability. After admitting an alien through the VWP, the immigration officer retains the arrival portion

In effect, the waiver of rights takes VWP aliens out of the normal procedures that ordinarily govern the admission and removal of aliens under 8 U.S.C. 1229a. See, *e.g.*, *Ferry* v. *Gonzales*, 457 F.3d 1117, 1126 (10th Cir. 2006) (The waiver "assure[s] that . . . [a VWP alien] will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays.") (quoting *Handa* v. *Clark*, 401 F.3d 1129, 1135 (9th Cir. 2005)). Except for asylum applicants (not relevant here), aliens admitted through the VWP who fail to comply with the terms of admission or fail to depart the United States are generally not entitled to proceedings before immigration judges. See 8 C.F.R. 217.4(b)(1) (Removal of an alien admitted under the VWP "shall be effected without referral of the alien to an immigration judge for a determination of deportability, except * * * [for] an alien * * * who applies for asylum in the United States."); 8 C.F.R. 1208.2(c)(1)(iv) (VWP alien who overstays his visa "*not entitled to [removal] proceedings under section 240 of the Act* [8 U.S.C. 1229a]").

c. The Attorney General is generally authorized to adjust the status of an alien who has been admitted to the United States and is present in the United States to that of an alien admitted for lawful permanent residence. See 8 U.S.C. 1255(a). Through the exercise of that authority, the Attorney General may relieve an alien already present in this country of the burdens of consular processing. A favorable exercise of discretion

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and returns the departure portion of the Form I-94W and passport to the alien. See U.S. Dep't of Homeland Security, *Arrival-Departure Record, CBP Form I-94W, for Visa Waiver Program (VWP) Applicants* (Dec. 30, 2008) <http://www.cbp.gov/xp/cgov/travel/id_visa/i 94_instructions/cbp_i94w_form.xml>.

to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

One of the requirements for adjustment of status is that "an immigrant visa [be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(3). An alien can satisfy that requirement by showing that a spouse who is a United States citizen has filed a visa petition for the alien's benefit and that the petition has been approved. See *INS* v. *Miranda*, 459 U.S. 14, 15 (1982) (per curiam).

2. Petitioner is a native and citizen of Argentina.[2] Pet. App. 19a; Certified Admin. R. 3-4, 6 (A.R.). On September 24, 2000, at age 19, petitioner was granted admission into the United States under the VWP for a period not to exceed 90 days. Pet. App. 3a; A.R. 6 (petitioner's Form I-94W). Petitioner claims that he met Vera Paez, a United States citizen, in 2001. Pet. App. 11a. The couple married seven years later, in 2008. *Id.* at 12a.

On January 3, 2009, petitioner was arrested and charged with two counts of simple battery stemming

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[2] Although Argentina was a designated VWP participant at the time that petitioner sought admission to the United States, its participation was terminated in February 2002 after the Department of Justice determined, in consultation with the Department of State, that Argentina's participation in the VWP was no longer compatible with the enforcement of United States immigration laws. See U.S. Dep't of Justice, *Department of Justice Terminates Argentina's Participation in Visa Waiver Program* (Feb. 20, 2002) <http://www.usdoj.gov/opa/pr/2002/February/02_ins_090.htm>. That decision stemmed from an increase, seen after the collapse of Argentina's economy and subsequent deterioration of its employment market, in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally in the country after their 90-day period of admission had expired. *Ibid.*

from an argument with his sister and her husband. Pet. App. 12a. He was taken to the county jail, where he claims he was interviewed by an immigration official on January 7, 2009. *Ibid.*[3]

On January 8, 2009, Immigration and Customs Enforcement (ICE) issued an order of removal against petitioner for having remained in the United States longer than authorized, in violation of 8 U.S.C. 1227(a)(1)(B). Pet. App. 3a-4a. At that time, ICE also issued a Notice of Intent to Remove, informing petitioner that he had violated the terms of his admission under the VWP and that, as a result, he would be removed from the United States pursuant to 8 U.S.C. 1187 and 1227(a)(1)(B). Pet. App. 20a; A.R. 2.

On January 13, 2009, petitioner pleaded nolo contendere to one charge of simple battery (the second charge was dropped). Pet. App. 19a. The court sentenced petitioner to ten days in county jail, credited him with time served, and ordered twelve months of probation. *Ibid.* On January 17, 2009, petitioner was transported from county jail to an immigration detention center in Miami, Florida. *Ibid.*

3. a. On March 20, 2009, petitioner filed a petition for review of his removal order in the Eleventh Circuit. Pet. App. 20a. On March 26, 2009, petitioner also filed an emergency motion for stay of removal pending review, *ibid.*, accompanied by his unsworn declaration (dated March 24, 2009). That declaration stated, *inter alia*, that "to the best of [his] knowledge," on January 17, 2009, ICE agents asked petitioner if he wanted to

[3] Petitioner's Form I-213 (Record of Deportable/Inadmissible Alien) indicates that Immigration and Customs Enforcement agents encountered petitioner at the jail pursuant to a routine sweep on January 8, 2009. A.R. 3-4.

sign a "deportation order," which he refused to do; on January 22, agents told petitioner he needed to sign "the deportation paper and leave"; and on February 5, petitioner was directed to tell his wife to provide his passport "so they can deport [him] quickly," and was advised not to fight it because he "was already going to be deported." Emergency Mot. for Stay of Removal Pending Review, Exh. 1, at 3 (¶ 12), 4 (¶¶ 13, 16), 7 (Decl.). The declaration nevertheless asserted that petitioner "never received notice of the immigration charges against [him]" and "never received a copy of any removal order against [him]." Decl. 5 (¶ 18).

According to petitioner, on February 20, 2009, ICE agents asked him to sign some papers, including a document (Form I-299(a), Warning for Failure To Depart) stating that a final order of removal had been issued against him on January 8, 2009. Decl. 5 (¶ 17); Pet. App. 5a-7a. Petitioner refused to sign the papers and asked that the papers be sent to his attorney. Decl. 5 (¶ 17); see Pet. App. 7a.

b. On April 22, 2009, in an unpublished per curiam order, the court of appeals dismissed the petition for review as untimely under 8 U.S.C. 1252(b)(1) and denied petitioner's motion to stay his removal as moot. Pet. App. 1a-2a. On April 24, 2009, the court of appeals construed petitioner's Emergency Motion for Rehearing and Rehearing En Banc and to Stay Deportation as a motion for reconsideration of its April 22, 2009 order dismissing the petition for review and denied the motion. *Id.* at 8a. Petitioner was removed from the country that same day. Pet. 10.

c. This Office has been informed that, according to United States Citizenship and Immigration Services (USCIS), petitioner's wife filed an immigrant relative

visa petition on petitioner's behalf in February 2009, and that petition was approved on July 21, 2009.

ARGUMENT

Petitioner asserts that he did not receive timely notice of the order of removal and contends that the court of appeals consequently erred in dismissing his petition for review. Petitioner's assertion is factbound, and the court of appeals' unpublished order dismissing his petition for review does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner fails to show that this Court's review would make any material difference in his case. Further review is therefore unwarranted.

1. The INA states that a petition for review of a final order of removal "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). A court of appeals is thus statutorily precluded from considering a petition for review if the petitioner fails to seek judicial review within that time limit. See Fed. R. App. P. 26(b) (forbidding any extension of the time to seek review of an administrative order unless a statute expressly authorizes the court to do so). As this Court held in *Stone* v. *INS*, 514 U.S. 386 (1995), the time limit for filing a petition for review is a "jurisdictional" rule that "must be construed with strict fidelity" to its terms. *Id.* at 405.

Even assuming that the date of service or other form of notice of a removal order could affect the jurisdictional 30-day filing period that commences from the date the order was issued, petitioner's argument is premised on his assertion (Pet. 21) that "there is no dispute" as to whether he received timely notice that he had been ordered removed. Petitioner relies on the self-serving

statement in the declaration he filed in the court of appeals that, "to the best of [his] knowledge" (Decl. 7), he did not receive timely notice. But the government cast considerable doubt on that assertion before the court of appeals, based on contradictory assertions in petitioner's declaration. See Pet. App. 22a n.3. For example, petitioner indicated awareness of a removal order as early as January 17, 2009, when ICE agents asked him if he would sign a "deportation order," or at least by February 5, 2009, when he was directed to tell his wife to provide his passport "so they can deport me quickly." Decl. 3 (¶ 12), 4 (¶ 16). That factbound issue counsels against this Court's review.

2. Petitioner contends (Pet. 13-20) that the courts of appeals disagree on whether the time for filing a petition for review of a final removal order runs from the date of the order or from the date of service. Petitioner asserts that his petition for review would have been timely in the First, Second, Third, Fifth, Sixth, and Ninth Circuits, which he says recognize that the 30-day period for filing a petition for review "does not start to run until the Government complies with its obligation to notify the [alien] ordered removed about the order of removal." Pet. 11. But all the cases on which petitioner relies involved a final removal order issued by the Board of Immigration Appeals (BIA) following removal proceedings before an immigration judge. When the BIA issues a final removal order, 8 C.F.R. 1003.1(f) requires it to serve that order on the alien. By petitioner's own description, it was the BIA's failure to comply with that regulation that provided the rationale for those decisions. See Pet. 13-16 (citing cases).

This case, however, involves a removal order issued directly by ICE against a VWP alien, who had waived

any right to contest removal by virtue of the VWP. Because petitioner's removal order was not issued by the BIA, it was not subject to 8 C.F.R. 1003.1(f). Although petitioner argues (in a footnote, Pet. 13-14 n.1) that a separate regulation (8 C.F.R. 103.5a(c)) imposes a similar service obligation and should have a similar effect on the 30-day period for filing here, petitioner fails to cite any authority—let alone a conflicting circuit court decision—for that proposition. Accordingly, even assuming that an unpublished and non-precedential order such as the one entered by the court below could give rise to the sort of circuit conflict warranting review by this Court, that order does not conflict with the decision of any other court of appeals.[4]

3. Petitioner also contends (Pet. 23-25) that the Due Process Clause entitled him to a removal hearing before he could be deported from the United States. Petitioner, who waived the right to contest removal when he entered the country under the VWP, has no right to an evidentiary hearing concerning his removal. See 8 U.S.C. 1187(b). That is an integral part of the statutory bargain struck between the government and aliens seeking to take advantage of the privilege of entry under the VWP. See pp. 2-3, *supra*.

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[4] To support his claim of conflict, petitioner cites another unpublished decision from the Eleventh Circuit as well as decisions from the Seventh and Tenth Circuits that purportedly conclude that the 30-day period for seeking appellate review runs from the date of the order, irrespective of when service occurred. See Pet. 16-20. But those cases involved orders of removal issued by the BIA, and thus at best would conflict with the line of circuit cases discussed above also involving BIA orders subject to 8 C.F.R. 1003.1(f). For the reasons just discussed, this VWP case is not a proper vehicle to resolve any such separate conflict.

To the extent petitioner claims that he did not knowingly and voluntarily waive the right to contest removal (see Pet. 20 n.5), that claim presupposes a legal right to challenge the waiver on such grounds. Although the Fifth Circuit's decision in *Nose* v. *Attorney General of the United States*, 993 F.2d 75, 78-79 (1993), appears to permit such a challenge, the government is currently contesting that proposition in *Bayo* v. *Chertoff*, 535 F.3d 749 (7th Cir. 2008), vacated, No. 07-1069 (7th Cir. Jan. 30, 2009) (argued on reh'g en banc May 13, 2009). In any event, petitioner's contention is dubious as a factual matter given that, before gaining admission into the United States, he executed a Form I-94W (which includes the waiver of rights) in Spanish. A.R. 6; see note 1, *supra*.

Moreover, petitioner has no constitutionally protected liberty interest in his underlying claim for adjustment of status (see Pet. 20 n.5)—a discretionary form of relief. See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir.), cert. denied, 546 U.S. 938 (2005); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985). And in any event, an alien admitted under the VWP who stays beyond the authorized period and then applies for adjustment of status is not entitled to an adjustment. See, *e.g.*, *Momeni* v. *Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008); *Lacey* v. *Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007); *Schmitt* v. *Maurer*, 451 F.3d 1092, 1096 (10th Cir. 2006). Although the Ninth Circuit has permitted a VWP alien to apply to adjust status based on a preexisting marriage *before* the 90-day period expired, see *Freeman* v. *Gonzales*, 444 F.3d 1031

(2006), petitioner here did not marry a United States citizen until seven years *after* his authorized period of entry had expired and did not apply for adjustment based on that marriage at any point before his removal. Accordingly, petitioner has failed to establish any reasonable likelihood that he would prevail on his claim for relief from removal.[5]

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[5] Petitioner nevertheless may still pursue an application for lawful permanent resident status through a United States consulate. As noted above (pp. 6-7, *supra*), petitioner is now the beneficiary of an approved I-130 immediate relative visa. Accordingly, petitioner is eligible to seek an immigrant visa from an overseas consular officer. See 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). A consular officer who is presented with an approved petition for an immediate relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182. See 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a). Although petitioner is now subject to a period of inadmissibility under 8 U.S.C. 1182(a)(9)(A)(i) and (ii) after having been removed from the United States, that period may be waived by the Attorney General or USCIS. See 8 U.S.C. 1182(a)(9)(A)(iii). The granting of such a request, of course, would be committed to the sound discretion of the responsible government officials—just as is true for a grant of adjustment of status. See *INS* v. *Abudu*, 485 U.S. 94, 105 (1988); 71 Fed. Reg. 27,588 (2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JENNIFER P. LEVINGS
Attorneys

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(3)

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CASE NO. 09-106

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC PEDERNERA,
Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY FOR THE PETITIONER

Francisco A. Rodriguez, Esq.*
Akerman Senterfitt
One S.E. Third Avenue
25th Floor
Miami, Fla. 33131
305-374-5600

Tania Galloni, Esq.
Florida Immigrant
Advocacy Center
3000 Biscayne Blvd.
Ste. 400
Miami, Fla. 33137
305-573-1106

* Counsel of Record

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REPLY BRIEF FOR THE PETITIONER

The Government devotes most of its Response to matters that have no bearing on the simple statutory interpretation question presented in this Petition: when does the time to seek judicial review of an order of removal begin to run under 8 U.S.C §1252(b)(1)?

In the Response, the Government acknowledges that Mr. Pedernera's petition for review of the order of removal rendered against him is governed by §1252(b)(1). *See* Resp. at 1-2; *see also* Pet. App. at 21a. The Government also acknowledges that the circuit courts are in conflict as to whether the time to seek review of a removal order under §1252(b)(1) begins to run on the date the order is rendered or on the date the Government complies with its obligation to serve the order on the immigrant ordered removed. *See* Resp. at 9 n.4. Yet, the Government contends that this case is not the "proper vehicle" to resolve this long standing conflict. *See id.* This contention is based on three fallacies, each of which is debunked below.

1. The Government first argues that this Petition is "factbound" because there is a dispute as to when Mr. Pedernera received notice of the order of removal rendered against him. *See id.* at 7-8. That contention is belied by the record.

It is undisputed that the Government did not provide notice that a final order of removal had been rendered against Mr. Pedernera until 43 days after the order was signed. Certainly, the Government did not aver below, and has not now averred in its Response, that it ever served the order of removal on Mr. Pedernera prior to that time.

The Government relies on Mr. Pedernera's statement that he was asked on January 17, 2009 to consent to his deportation – which he declined to do - and that he was directed to tell his wife to provide his passport. *See* Resp. at 8. But Mr. Pedernera was never told that a removal order had already been rendered against him, much less given a copy of such order. That the Government apparently sought Mr. Pedernera's consent to removal is a far cry from notifying him that an order of removal had already been rendered.

More importantly, the Eleventh Circuit's order is not premised on this tortured reading of Mr. Pedernera's undisputed declaration. Rather, the Eleventh Circuit's order of dismissal is based on the pure legal conclusion that under §1252(b)(1), a "March 20, 2009, petition for review is untimely to review" an order of removal rendered on "January 8, 2009." *See* Pet. App. at 1a. The order reflects the Eleventh Circuit's narrow interpretation of §1252(b)(1) – an interpretation rejected by at least six other circuit courts.

Contrary to the Government's first argument, then, this Petition presents a unique opportunity to resolve the conflict the Government acknowledges exists about the period to seek review under §1252(b)(1).[1]

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[1] The Government correctly points out that §1252(b)(1) must be construed with strict fidelity to its "terms." *See* Resp. at 7 (*citing Stone v. I.N.S.*, 514 U.S. 386, 405 (1995)). This Petition, however, asks this Court to settle the circuit split over the interpretation of those "terms," namely whether the "date of the final order of removal" means the date the Government rendered the order or the date the Government complied with its obligation to serve the order on the individual ordered removed.

2. The Government's second argument is that unlike the cases cited in the Petition to demonstrate the circuit conflict, this case involves a removal order rendered by Immigration and Customs Enforcement ("ICE") and not a removal order issued by the Board of Immigration Appeals ("BIA"). *See* Resp. at 8-9. But this is a distinction without a difference.

As the Government acknowledges, a request for judicial review of an order of removal is governed by §1252(b)(1), irrespective of whether such order was rendered by ICE or by the BIA. *See* Resp. at 1-2; *see also* Pet. App. at 21a. There is no difference with respect to the period to seek review of a final order of removal, regardless of which Government agency issues it.

Notably, none of the cases cited in the Petition rely on any factor or circumstance unique to a BIA proceeding. These cases are premised on the principle that the review period of §1252(b)(1) would be illusory if the Government were not required to comply with its obligation to serve a final order of removal on the immigrant ordered removed. *See* Pet. at 13-16.

That principle, which arises from fundamental due process, applies to any petition for review governed by §1252(b)(1).

An immigrant who does not receive notice of an order of removal entered against him by ICE is in the same shoes as an immigrant who does not receive notice of a final order of removal by the BIA. Both agencies are required to serve a final order of removal on the immigrant ordered removed. *See* 8.C.F.R. 1003.1(f); 8 C.F.R. 103.5a(c). And, a petition for review of either must be filed within the 30 day period prescribed by §1252(b)(1). As such, decisions construing the right to seek review of removal orders issued by the BIA apply equally to the right to seek review of orders issued by ICE.[2]

If this Court agrees with the First, Second, Third, Fifth, Sixth, and Ninth Circuits and holds that the review period of §1252(b)(1) commences when the Government complies with

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[2] Notably, the Government did not hesitate to cite case law involving removal orders issued by the BIA in its jurisdictional brief in the Eleventh Circuit. *See* Pet. App. at 22a n.3 (*citing Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272 n.3 (11th Cir. 2005)).

its obligation to serve the order of removal on the immigrant ordered removed, that ruling will apply with equal force to petitions seeking the review of final orders of removal issued by the BIA or ICE.

Accordingly, this case is ideal for resolving the long standing conflict about the review period of §1252(b)(1).

3. In its third objection to the Petition, the Government argues hat Mr. Pedernera was not entitled to a hearing before removal because he purportedly waived his right to contest removal.

This is a remarkable proposition since Mr. Pedernera has a constitutional right to due process before removal,[3] and the Government

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[3] An immigrant's right to due process before removal has been repeatedly upheld by this Court. *See Zadvydas v. Davis*, 533 U.S. 2491, 2500-01 (2001); *Reno v. Flores*, 50 U.S. 292, 306 (1993); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

never presented any evidence that Mr. Pedernera ever waived his due process rights.

In its Response, the Government relies on the Visa Waiver Program's general requirement that entrants sign a waiver of rights to represent that Mr. Pedernera did so, and cites an unsigned proof of entry form the Government submitted below. *See* Resp. at 10. The Government, however, has never produced any waiver form purportedly signed by Mr. Pedernera. Neither the Certified Administrative Record cited throughout the Response nor any of the Government's filings in this case contains any evidence that Mr. Pedernera waived his due process rights.

The Government has apparently taken the position in another case that a Visa Waiver Immigrant who waives his right to contest removal cannot argue that he did not knowingly and voluntarily execute the waiver. *See* Resp. at 10. That argument has no bearing in this case, however, because the Government has not presented any evidence that Mr. Pedernera waived his due process rights. In the absence of proof of a waiver, Mr. Pedernera has the right,

as any other immigrant, to contest his removal. *See* p. 7 n.3 *supra*. The Government cannot deny Mr. Pedernera his day in court on the mere assumption that he affirmatively waived these fundamental due process rights.[4] Nor does the possibility that the Government may try to prove waiver in the future make this case less appropriate to resolve the conflict about the commencement of the §1252(b)(1) review period.

The Government also suggests that Mr. Pedernera does not have any liberty interest in his underlying claim for adjustment of status based on marriage to a U.S. citizen because such relief is discretionary. But this argument misses the mark. The constitutionally protected interests at stake in this case are the right of every immigrant to have notice of a final removal

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[4] The Eleventh Circuit has explicitly refused to assume that an immigrant has waived his right to contest removal based merely on his admission through the Visa Waiver Program, in the absence of evidence of the purported waiver. *See e.g., Mokarram v. U.S. Att'y Gen.*, 2009 WL 511500, *2-4 (March 2, 2009). Yet, the Government was able to deport Mr. Pedernera – without ever having to satisfy its burden - and avoid judicial review because of the Eleventh Circuit's interpretation of §1252(b)(1).

order and the right to a hearing before removal. Irrespective of whether the adjustment of status is ultimately a form of discretionary relief, the Government cannot deprive Mr. Pedernera of his constitutional right to present evidence of his eligibility for this relief before summarily separating him from his U.S. citizen wife and family. The Government's discretionary authority arises only after Mr. Pedernera has been afforded a hearing. *See Patel v. Ashcroft*, 375 F.3d 693, 697 (8th Cir. 2004) (reasoning that the principle that an immigrant does not have vested rights in discretionary relief "refers to the [immigration judge's] ultimate discretionary decision to accord or deny the status after examining the merits of an eligible alien's application ... that would occur after the BIA remands the case to the IJ, who has the exclusive jurisdiction to decide the adjustment of status application."); *Bull v. I.N.S.*, 790 F.2d 869, 870-73 (11th Cir. 1986) (vacating order of removal to allow consideration of discretionary adjustment of status based on marriage to U.S. citizen). The Government has the discretion to ultimately grant or deny Mr. Pedernera's request

for adjustment of status. But it must give Mr. Pedernera an opportunity to be heard before it exercises that discretion.[5]

CONCLUSION

This Court should take the opportunity presented by this case to bring uniformity to the period to seek review of an order of removal under §1252(b)(1). Contrary to the Government's argument, this case, with its undisputed set of facts, is the ideal and proper vehicle for the resolution of this long standing conflict. Accordingly, the Court should grant the Petition.

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[5] The Government suggests in passing that this Court's review would not make any material difference in Mr. Pedernera's case. *See* Resp. at 7. This argument fails because, as the Government recognizes in another section of its Response, the order of removal prevents Mr. Pedernera from adjusting his immigration status – which he could otherwise do based on his marriage to a U.S. citizen - for ten years. *See* Resp. at 11 n.5

Respectfully submitted,

Francisco A. Rodriguez, Esq.
Florida Bar No. 0653446
AKERMAN SENTERFITT
SunTrust International Center
One S.E. Third Avenue – 25th Floor
Miami, Florida 33131-1704
Telephone: (305) 374-5600
Facsimile: (305) 374-5095

and,

Tania Galloni, Esq.
Florida Bar No. 619221
Florida Immigrant Advocacy Center
3000 Biscayne Blvd., Ste. 400
Miami, Florida 33137